2248

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 244.

THOMAS E. KEPNER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

FILED MARCH 23, 1903.

(18,875.)

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1 Supreme Court of the United States, October Term, 1902.

THOMAS E. KEPNER, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

In error to the supreme court of the Philippine islands.

Proceedings Had in the Court of First Instance of the City of Manila and the Supreme Court of the Philippine Islands.

THE UNITED STATES
vs.
THOMAS E. KEPNER.

Be it remembered that heretofore, to-wit, on the 28th day of October, A. D., 1901, in the court of first instance of the city of Manila, part II, came W. H. Bishop, prosecuting attorney of the city of Manila, P. I., and filed in the clerk's office of said court an information signed and sworn to by one Aun-Tan, against Thomas E. Kepner, which said information is in the words and figures following, to-wit:

2 *Complaint or Information.*

THE UNITED STATES
versus
THOMAS E. KEPNER.

In the Court of First Instance of the City of Manila, P. I., the 28th Day of October, 1901.

The undersigned accuses Thomas E. Kepner of the crime of swindling committed as follows:

That the said Thomas E. Kepner is now and during all times herein mentioned was an attorney-at-law duly admitted to practice his profession in the city of Manila, P. I., and that then and there, by virtue of his said office of attorney-at-law, he was designated and appointed on the 1st day of April, 1901, by one Aun-Tan as his lawyer in a certain criminal case and all matters incident thereto, pending before the military commission in said city, in which The United States was complainant and the said Aun-Tan and one Wong-Chong were defendants, and that thereafter, to-wit, the 21st day of September, 1901, Thomas E. Kepner assumed the possession and control, as attorney appointed as aforesaid, for the use and benefit of the said Aun-Tan, of a certain warrant which with all the endorsements is hereto attached and marked Exhibit "A" as a part hereof; said warrant being of the value of one thousand dollars

and the personal property of said Aun-Tan; and that thereafter, o
the 23rd day of September, 1901, the said Thomas E. Kepner wit
out the knowledge or consent of the said Aun Tan endorsed sa
warrant as follows: "Aun-Tan, by Thomas E. Kepner, his attorne
Thomas E. Kepner," and having endorsed said warrant as abo
stated without the knowledge or consent of said Aun-Ta
3 then and there presented the same to the Chartered Bank
India Australia and China for payment then and the
whereby he received the sum of one thousand dollars, gold, and t
said Thomas E. Kepner, in the city of Manila, P. I., the 23rd day
September, 1901, willfully, wrongfully, wickedly and fraudulent
stole, converted, and appropriated to himself the said one thousa
dollars, gold, for his own use without the consent of and to t
prejudice of the said Aun-Tan; contrary to the statute in such ca
made and provided.

his
AUN TAN (Chinese characters).
mark.

Witnessed:
J. McMICKING.

Signed and sworn to before me this 28th day of October, 1901,
Manila, Philippine islands.

(Signed) J. McMICKING,
Clerk of the Court of First Instance of Manila.

Witnesses:

O. C. Hing, No. 19 Magallanes street.
Charley Hung, across the street from the "Manila American."
Yick Gich, No. 79 Nueva street,
Aun Tan, No. 348 Jolo street.
J. H. Curley, office of the civil governor of the Philippines.
Sidney M. Gans, auditor's office, treasury building.

to the foregoing complaint received to-day, October 28th, 1901, wi
the document attached. So certified.

(Signed) J. McMICKING,
Clerk of the Court of First Instance of Manila

Settlement Warrant Attached to Complaint.

The military government of the Philippine archipelago.

$1,000.00, U. S. currency.

No. 65. MANILA, P. I., *September* 20, 1901

To the treasurer of the Philippine archipelago:

Pay to Aun Tan or order one thousand no/100 U. S. currency dollars.

W. H. TAFT,
Civil Governor

Settlement No. 66.
A. L. LAWSHE, *Auditor.*

4 (Endorsements on front of warrant.)

In accordance with law this warrant to be paid in local currency. The Chartered Bank of India, Australia and China, Manila, P. I., will pay this warrant.

(Signed) FRANK A. BRANNAGAN, *Treasurer.*

(Endorsements on back of warrant.)

"Before endorsing read these instructions:" The name of the payee as endorsed must correspond in spelling with that on the face of the warrant. No guarantee of an endorsement, imperfect in itself, can be accepted. If the name of the payee, as written on the face of the warrant, is spelled incorrectly the warrant should be returned to the military governor for correction.

Endorsements by mark (x) must be certified to by two witnesses, giving their place of residence.

Payees and endorsees must endorse by their own hands; officials, officially with full title; firms, the usual firm signature by a member of the firm, not by a clerk or other person for the firm.

Delay in presentation of this warrant for payment should be avoided.

AUN TAN,
By THOMAS E. KEPNER,
His Attorney.
THOMAS E. KEPNER.

Afterwards, to-wit, on the 29th day of October, 1901, the defendant Thomas E. Kepner appeared in the court of first instance, part II, and gave bail for his appearance in said court.

5 Afterwards, to-wit, on the 13th day of November, 1901, the defendant Thomas E. Kepner was arraigned in part I of said court of first instance, before the bar of said court, and pleaded *not guilty*, and the trial of said cause set for the 15th day of November, 1901.

Afterwards, to-wit, on the 15th, 16th and 18th days of November, 1901, said defendant Thomas E. Kepner was tried before the Honorable Fletcher Ladd, one of the judges of the supreme court of the Philippine islands, sitting as judge of said court of first instance, part I, without a jury.

Afterwards, to-wit, on the 18th day of December, 1901, the following decision was rendered by said judge, and filed in the clerk's office:

Decision.

In this case there is evidence tending to show that the money which the respondent is charged with unlawfully converting was in fact appropriated by him under a *bona fide* claim of right, and on

the whole I think this evidence is of sufficient weight to raise a reasonable doubt as to the existence of a fraudulent intent which is an essential element of the offense. I therefore find the respondent not guilty.

Manila, P. I., 18th December, 1901.

(Signed) FLETCHER LADD,
Judge of the Court of First Instance, Manila, Part I.

(Signed) THOMAS E. KEPNER.

Afterwards, to-wit, on the 20th day of December, 1901, came the prosecuting attorney of the city of Manila, and appealed from the judgment, in said cause, finding the defendant not guilty, which said appeal is in the words and figures following, to-wit:

6

THE UNITED STATES
against
THOMAS E. KEPNER. } Notice of Appeal.

In the Court of First Instance of the City of Manila, Philippine Islands, on the 20th Day of December, 1901.

Comes now the prosecuting attorney, for and on behalf of the United States, and appeals from the judgment, in the above entitled action, finding the accused not guilty.

(Signed) W. H. BISHOP,
Prosecuting Attorney for the City of Manila, P. I.

(Endorsed:) Received copy, December 20, 1901. (Signed) Thomas E. Kepner. (Signed) Ralph Platt, attorney for defendant.

Afterwards, to-wit, on the 21st day of December, 1901, the following order was made by the court of first instance in said cause, which said order, is in the *orders* and figures following, to-wit:

MANILA, 21*st December*, 1901.

The appeal is admitted and the case shall be duly forwarded to the supreme court. It was so ordered and signed by the honorable judge.

(Signed) FLETCHER LADD.

Afterwards, to-wit, on the 8th day of January, 1902, the said cause was forwarded to the clerk of the supreme court, by letter of transmittal, which said letter of transmittal is in the words and figures following, to-wit:

In the Court of First Instance of the City of Manila, P. I.

MANILA, *January 8th*, 1902.

To the clerk of the supreme court of the Philippine islands.

SIR: I have the honor to forward to you herewith case number 131 against Thomas E. Kepner for estafa by virtue of an ap-
7 peal taken by the prosecuting attorney against the judgment of acquittal rendered therein. I beg to state that the delay in transmitting the case was due to translating the testimony in English comprising 101 pages, which is not yet terminated.

Respectfully,

(Signed) J. McMICKING,
Clerk of the Court of First Instance of Manila.

(Endorsed:) Filed, this 9th day of January, 1902, at 8:46 a. m. F. C. Fisher, clerk of the supreme court, by E. H. Cole, deputy.

Afterwards, to-wit, on the 9th day of January, 1902, came Thomas E. Kepner, personally and by his attorney, and moved that said cause be dismissed, which said motion is in words and figures as follows, to-wit:

United States of America, Philippine Islands, Supreme Court.

UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
THOMAS E. KEPNER, Defendant and Respondent.

Motion of Respondent to Dismiss the Appeal of the United States.

Comes now the respondent, personally and by Ralph Platt his attorney, and moves the court to dismiss the appeal taken on behalf of the United States of America in the above entitled cause for that under the laws now in force in the Philippine islands, the United States is not entitled to an appeal in a criminal case from a finding of not guilty and a judgment of acquittal.

(Signed) THOMAS E. KEPNER,
In His Own Behalf, Respondent.

(Signed) RALPH PLATT,
Of Counsel with Respondent.

(Endorsed:) Copy of the foregoing motion received this 6th day of January, 1902. (Signed) L. R. Wilfley, attorney general. Filed this 9th day of January, 1901, 11:02 a. m. (Signed) E. H. Cole, deputy clerk.

8 Afterwards, to-wit, on the 20th day of January, 1902, the court met in public session and the hearing was announced of the motion of Thomas E. Kepner, the accused in case No. 571, of the docket of this court, for the dismissal of the appeal of the prosecuting attorney against the judgment of acquittal rendered at first instance. The accused Kepner appeared on his own behalf, the solicitor general, Don Gregorio Arraneta, appearing on behalf of the Government. After argument by counsel, the motion was submitted and taken under advisement.

[On the margin:] F. C. F.

Afterwards, to-wit, on the 6th day of February, 1902, at a closed session of the court, upon motion of the chief justice, the following resolution was unanimously adopted:

"The motion of the defendant Kepner in case No. 571 of the docket of this court for the dismissal of the appeal taken by the prosecuting attorney against the judgment of acquittal rendered at first instance is denied."

[On the margin:] F. C. F.

Afterwards, to-wit, on the 19th day of July, 1902, came Thomas E. Kepner, by Frederick Garfield Waite, his attorney, and renewed his motion to dismiss said appeal, which said motion is in the words and figures following, to-wit:

United States of America, Philippine Islands, Supreme Court.

UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
THOMAS E. KEPNER, Defendant and Respondent.

Motion to Dismiss Appeal.

Comes now the defendant and appellee in the above entitled cause, by Frederick Garfield Waite, his attorney, and moves the court to dismiss the appeal in the above entitled cause for that under the laws in force in the Philippine islands, the United States
9 is not entitled to an appeal from a finding of not guilty and judgment of acquittal in any criminal cause.

[On the margin:] F. C. F.

(Signed) FREDERICK GARFIELD WAITE,
Attorney for Defendant and Respondent.

(Endorsed:) Received a copy of the foregoing document this 19th day of July, A. D., 1902. (Signed) Gregorio Araneta, solicitor general. Filed in the clerk's office this 16th day of August, 1902 F. C. Fisher, clerk of the supreme court, by E. H. Cole, deputy.

Afterwards, to-wit, on the 1st day of September, 1902, the hearing of the motion of the accused Kepner for the dismissal of the appeal of the prosecuting attorney against the judgment of acquittal rendered at first instance in case No. 571 of the docket of this court, was announced: Attorney F. G. Waite, appeared on behalf of the accused, and the solicitor general, Don Gregorio Araneta, on behalf of the Government. After argument by counsel, the motion was submitted to the court and taken under advisement.

[On the margin:] F. C. F.

Afterwards, to-wit, on the 16th day of September, 1902, the following resolution was adopted: "Resolved unanimously that the motion of the defendant Kepner in case No. 571, for the dismissal of the appeal of the prosecuting attorney, against the judgment of acquittal rendered at first instance is denied."

[On the margin:] F. C. F.

Afterwards, to-wit, on the 19th day of September, 1902, the court met in public session and the hearing was announced of case No. 571, The United States *vs.* Kepner,—Attorney F. G. Waite, appearing on behalf of the defendant, and Don Gergorio Araneta, appearing on behalf of the Government. After argument by counsel the case was submitted and taken under advisement.

[On the margin:] F. C. F.

Afterwards, to-wit, on the 11th day of October, the decision of the court was announced on the motion of the accused Kepner, in case No. 571, to dismiss the appeal of the prosecuting attorney from the judgment of acquittal rendered at first instance, which said decision is in the words and figures following, to-wit:

10 THE UNITED STATES, Plaintiff and Appellant, *vs.* THOMAS E. KEPNER, Defendant and Respondent. } Register General, No. 571.

Decision.

The defendant in this case was brought to trial in the court of first instance of Manila on the charge of "estafa," and after a full hearing of the case he was acquitted. From the judgment of acquittal the prosecuting attorney took an appeal to this court by virtue of the provisions of G. O. 58, sections 43, 44 *et seq.*, and the defendant now asks that the appeal so taken be dismissed on the ground that the Government is "not entitled to an appeal from a finding of not guilty, and a judgment of acquittal in a criminal case." A similar motion heretofore made by counsel for the accused was denied by this court. The renewal of the motion is based on the theory that that portion of the "Philippines bill," recently passed by Congress,

which secures a defendant against more than one jeopardy of punishment for the same offense, ought to receive the same construction given like provisions in the Constitution of the United States and the constitutions of various States of the Union and that therefore the previous ruling should now be reversed.

The court is still of the opinion that no jeopardy attaches to the defendant until the judgment for or against him has become final, and that the act of Congress temporarily providing for the administration of affairs in the Philippines affords no ground for any change in the ruling made on the first motion. Now, as then, the question is, Has the defendant been placed once in jeopardy by his trial and acquittal in the lower court? If he has, then he cannot again
11 be tried on the same charge, and the appeal ought not to be entertained as no result could follow its determination. If he has not then the appeal must be heard and determined in conformity with the law of procedure now in force in these islands.

All civilized peoples are substantially agreed that when a person accused of crime has been once finally convicted or acquitted of the charge against him he ought not to be vexed again by a prosecution for the same offense. The plea of once in jeopardy is the *res adjudicata* of the criminal case.

But, just when the right to the plea accrues, just when a defendant may call it to his protection and avail himself of it as a shield against further prosecution on the same charge, has presented, particularly to some American courts, difficulties which by the way do not arise from any perplexities inherent in the plea itself, but rather from a more or less rigid adherence to a long line of precedents which nobody seems willing to disturb but which nearly all admit, have now but little if any sound reason to support them.

Formerly, in England, the right to plead jeopardy after an acquittal or conviction was the necessary adjunct, the indispensable auxiliary of the trial by jury, inasmuch as the right of trial by his peers, reluctantly conceded as a remedy for judicial abuses, would have availed the citizen but little if the verdict of the twelve men good and true had been left to the mercy of a pliant judiciary who were the mere creatures of the authority or influence which made them.

12 Hence, no appeal was permitted from the verdict of the jury or from the judgment entered in conformity with it. Both were final and therefore the jeopardy became complete, not because there had been a conviction or an acquittal but because the question of innocence or guilt, of punishment or no punishment had been finally determined beyond all possibility of judicial change or alteration. From the fact, however, that the verdict of the jury, marked the final and definite determination of the proceeding it came to be regarded as the test of whether or not there was a completed jeopardy, and from this in its turn arose the correlative principle that once the trial had been begun before a competent court and jury, upon a valid indictment, no step backward being possible, any discharge of the jury not resulting by consent of the prisoner

or from a cause beyond the control of the court, perfected a jeopardy of the accused which he might plead in any subsequent prosecution against him on the same charge. This construction, by which the verdict of the jury and not the final determination of the case was made the test of an accrued jeopardy could affect no rights in England, either of the State or of the accused, inasmuch as the same result had to follow whether one construction or the other was adopted.

In some few States of the Union, however, whose constitutions gave voice to the common law maxim, that no man shall be brought in jeopardy twice for the same offense, the acceptance of the
13 verdict of the jury as the sole test of the accomplished jeopardy resulted in the reading into the constitutional provision the finality of a verdict of acquittal and the enunciation of the consequent doctrine that from a verdict of acquittal there could be no appeal even though such a step were expressly authorized by statutory enactment. This, too, although the courts of these very States found it entirely consistent to uphold the right of an accused to appeal from a judgment of conviction and secure a new trial upon the convenient doctrine lugged in by the ears that by taking an appeal the defendant waived his right to plead jeopardy. That is to say, he waived his plea—a most substantial right—when he sought by appeal to have an illegal conviction set aside for errors committed against him, but when the State invoked the same remedy to vacate an illegal acquittal secured, let us say, by his successful objection to proper, competent and material evidence of his guilt, he waived nothing.

The proposition that a person accused of crime is entitled to have an illegal and improper judgment against him modified, corrected, and set aside and that the State can have no relief against a similar judgment in his favor has neither sound sense nor sound law to support it. It prevents uniformity in the administration of justice and strikes at the ultimate purpose of all jurisprudence—a correct judgment legally obtained. The defendant has no higher right to be protected against an improper conviction than has the body politic to be secured against an unlawful*l* acquittal and a
14 miscarriage of justice. At first, when judges were the corrupt and willing tools of tyrannical power there may have been good reason for not permitting an appeal by *either* side from the verdict of twelve men duly selected to try the case, but when the courts became good enough to pass on the validity of a verdict of conviction, it would seem that they might be safely trusted to pass on the legality of a verdict of acquittal. When the reason for the rule ceased the rule ought to have ceased with it, and at all events it should not be read into the organic law as a limitation on legislative power to provide a proper remedy for the correction of judicial errors and mistakes.

But even if the cases cited by respondent (People *v.* Weber, 38 Cal., 467, and 19 Ill., 342) are correct in construing that the constitutional provision on jeopardy makes the judgment of acquittal

final and beyond attack or impeachment, their authority is of little avail in support of the motion unless it can be further shown that Congress adopted the jeopardy clause of the "Philippine bill" not in the light of existing insular laws but in the light of a judicial construction applicable at the best to jury trials, which have not now, never have had and are not likely to have in the immediate future any place in the jurisprudence of the archipelago.

The court is of the opinion that Congress did nothing of the kind. Any other conclusion would lead to the assumption that Congress intended the provision under discussion to be interpreted by
15 precedents not only far from satisfactory to many of the best jurists of its own country, but wholly at variance with the judicial system, procedural law and established precedents of the people for whose benefit the law was enacted.

Before the change of sovereignty there never was in the Philippine islands any finality to the judgment of the trial court in felony cases until it had been ratified and confirmed by the court of last resort. Such a judgment was merely advisory to the appellate tribunal, and might be modified, set aside, or changed, on the review of the record, either to the benefit or the prejudice of the defendant, *with or without an appeal*. Whether the court of first instance acquitted the defendant or convicted him he could not be placed at liberty in the one case or receive the punishment adjudged in the other until the reviewing authority had finally affirmed the judicial determination of the lower court. More than that, if the trial court *acquitted* the accused the *audiencia* (supreme court) might convict him, and if he was convicted it might raise or lower his punishment or even acquit him altogether.

This was *was* the law of the land when the change of sovereignty took place and it has only been modified since to the extent of making the judgments of courts of first instance in felony cases (except those for capital offenses) *final unless an appeal has been taken either by the attorney general or the accused*. So the-, so now, once a criminal cause is before the court, whether on appeal or in "consulta" the judgment may be changed, altered or reversed as to the appellate tribunal may seem proper.

16 Not being inconsistent with the act of Congress this law cannot be construed to have been repealed by implication, and it must be held to be now in full force for the purposes it was designed to effect.

To be in jeopardy in the legal sense it is not sufficient that the danger should have begun. It must also have ended before the plea can be made effectual. Jeopardy is not the peril of more than one trial, but the peril of more than one punishment, and in the same proceeding there can be no danger of a *second punishment* until the first has been *finally* adjudged.

Attention is called to the following decisions of this court and its immediate predecessor: D. Juan Garcia *v.* Cesar Lopez Garcon, criminal branch supreme court of justice, P. I., September 12th,

1900. United States *v.* Mateo Perez, supreme court P. I., April 9th, 1902.

For the foregoing reasons the court is of the opinion that respondent's motion to dismiss the appeal taken by the Government must be denied, and it is so ordered with costs against the moving party.

(Signed) JAMES F. SMITH, *Judge.*

We concur:

(Signed) CAYETANO ARELLANO, *Chief Justice.*
" FLORENTINO TORRES.
" J. T. COOPER.
" VICTORIANO MAPA.
" CHARLES A. WILLARD.
" FLETCHER LADD.

Afterwards, to-wit, on the 3rd day of December, 1902, the supreme court of the Philippine islands, announced its decision on the merits of the said case No. 571, The United States, *vs.* Thomas E. Kepner, which said decision is in the words and figures following, to-wit:

17 United States of America, Supreme Court of the Philippines.

THE UNITED STATES
vs.
THOMAS E. KEPNER.

Decision on the Merits.

Registro general, No. 571.

Thomas E. Kepner, an attorney at law, was charged in the court of first instance of the city of Manila with the crime of "estafa," alleged to have been committed by him by endorsing a warrant of the insular government made payable to his client Aun Tan and collecting and appropriating to his own use the amount due thereon without the authority or consent of the latter.

The accused was tried on the charge and after hearing the evidence of both sides the trial judge was of the opinion that there was evidence tending to show that the appropriation of the amount of the warrant was made under a *bona fide* claim of right. He therefore acquitted the defendant and the fiscal appealed.

Wong Cheong and Aun Tan, Chinese bakers, were charged before a military commission with illegally having in their possession some 400 sacks of com-issary flour, the property of the United States, against the statute and military regulations in such cases made and provided. On March 24th, 1901, while they were in confinement, O. C. Hing, a Chinese friend of the parties, retained Kepner to obtain their release on bail and to defend them before the mil-

itary court. It was agreed that the attorney should receive
18 for his professional services $300 Mex. cash and $700 Mex. additional on condition that he saved Wong Cheong and Aun Tan from fine or imprisonment, and secured the return of the flour which had been seized by the authorities. After obtaining the release of his clients on $3,000 Mex. bail and taking the statements, Kepner came to the conclusion on the 1st of May, 1901, that both were guilty of the offense with which they were charged and that in no event would he be able to procure a release of the flour. He therefore told the accused Chinamen as well as Hing "that it was absolutely out of the question to stand by the original agreement" and offered to return the $300 which had been already paid. He finally allowed himself, however, to be pursuaded to continue with the case for a consideration which he says was an unconditional fee of $500, payable on the determination of the cause. Hing says no agreement for an unconditional fee was ever made. His story is that after Aun Tan had been released on bail, Kepner declared that he could not get the flour back and proposed that that contingency should be eliminated from their understanding. To this proposition Hing consented and Kepner agreed to secure Wong Cheong and Aun Tan against fine or imprisonment for the sum of $500 in addition to what he had previously received. The trial of the two men took place about the 4th of May, 1901, and resulted in the acquittal of Wong Cheong and the conviction of Aun Tan, who was fined $1,000 gold and paid it.

On the 9th of May Kepner sent Hing a bill "for services *In re* The United States *v.* Wong Cheong and Aun Tan, as per agreement, $500.00." Hing flatly refused to pay the account on the ground that Aun Tan had been fined and that there was
19 nothing due under the terms of the contract. On June 20th, Kepner apparently yielded the point, for on that date he borrowed from Hing, his alleged debtor, $150.00, which he promised to repay on or before the 20th of July next ensuing. This he would scarsely have done if Hing had been indebted to him at the time in the sum of $500 for services which he asserted had been fully completed.

On the 1st of July, 1901, Hing went to the office of Kepner and asked him to make an effort to get the fine remitted and the confiscated flour returned. Hing says Kepner agreed to obtain the restoration of the fine and the flour for the sum of $1,000 Mex. Kepner says he agreed to get back the fine for a consideration of $500 Mex. and "that no agreement had been reached on the flour proposition" nor anything said on the subject beyond a conversation touching the making of an application for its recovery, and an offer on his part to do the work for $500. Kepner presented his petition for a remission of the fine, but before it had been acted upon officially, so far as appears from the evidence, he again made a demand on Hing for money, which was refused. Considering however, that the appellee had obtained the acquittal of Wong Cheong, Hong offered to allow him $250 in settlement of the second

contract, and the offer would appear to have been finally and definitely accepted by Kepner in his letter of the 12th of August, 1901, in which he says:

"DEAR MR. HING: I am surprised that you should say that you only owe me $250.00, but *until the fine is returned I will let it go that way.* I have received from you $150.00, clothes $36.00, balance due on collections, $21.25, balance due me $42.75. Please pay balance of $42.75 to Mr. Denmark, and oblige.

Yours respectfully, THOMAS E. KEPNER."

20 & 21 The sum of $42.75 was paid by Hing as directed by this letter, and on the 12th day of August, 1901, all sums then due by Hing to Kepner had been paid, and Hing so understood it.

Two days later, namely, on the 14th of August, 1901, although he had not yet received the return of the fine, Kepner notified Hing that the military authorities had remitted the fine and requested him to call the next day "and pay his bill in this case amounting as per agreement to $750.00 Mexican currency," apparently reviving his claim under the second contract and adding $500 for an alleged completion of the third contract. Hing refused to pay, saying that nothing was due or would become due until the fine and flour were recovered.

On the 24th of August Kepner received $200 from Hing as a loan, according to the latter, as a payment on the second contract according to the former. How anything could have become due in view of the settlement of August 12th, 1901, and in view of the fact that the fine had not been repaid, does not appear.

Although the fine was remitted and an order made for its return Kepner found that the money had been turned into the insular treasury, and that he could not get it without an act of the commission authorizing its payment. The mere fact that this formal act of the commission was required to get money out of the treasury caused Kepner, if he is to be believed, to despair of ever recovering of the fine, and he "threw up the case." According to his account he was induced to take it up again however, for a consideration,

50% of the amount recovered, which he says Hing agreed to

22 pay. Hing says he did nothing of the kind. However that may be the appellee wrote a letter to General Chaffee, asking him to refer the matter to the commission for an appropriation bill and on the 20th day of September a warrant in favor of Aun-Tan for $1,000 gold was drawn on the insular treasury by the civil governor, and countersigned by the auditor. The treasurer on the face of the warrant executed an order to the Chartered Bank of India, Australia and China to pay the warrant, and the same was then delivered to Kepner. Kepner requested Aun Tan to either endorse it or give him power to cash it, and Aun-Tan positively refused to comply. Kepner then told Hing that he would put the warrant in his safe until they could reach some agreement. On the 23rd of September, the following letter was written to Hing by Kepner:

"Mr. O. C. Hing, Calle Magallanes, No. 19, Intramuros.

My Dear Sir: I have to inform you that if you do not settle your account with me before Tuesday noon (September 24th) or endorse the draft I hold, I shall sue you and foreclose my lien on the draft.

Yours respectfully, THOMAS E. KEPNER."

On the very same day, September 23rd, without waiting until the following day, as indicated in his letter, Kepner, in the very teeth of Aun Tau's refusal to endorse the draft or to authorize its collection, wrote Aun Tan's name on the back of it by himself as attorney, presented it to the bank, represented that he had a power of attorney to make the endorsement, and had the full amount of the warrant credited to his account. He would not say that this account then amounted to more than $5.40.

23 On the very same 23rd of September, exclusive of the check to Hing, he drew checks against the $1,000 gold or $2000 Mex., so credited to him, for more than $1217.50 Mex. to pay personal bills. So that on the 24th of September, when he handed Hing a check for $450.00, Mex. and his receipted bill for $1550.00 Mex, the whole $2,000 Mex. had not only been actually appropriated, but more than $1200 Mexican of the sum had been actually expended by Kepner in the payment of personal accounts.

The sums paid by Hing to Kepner were $300 retainer on the first contract, $250.00 for the acquittal of Wong Cheong under the second contract, and $200 advanced on the third contract for the return of the fine and the flour—$750.00 in all. According to Kepner there accrued to him $300 for his retainer on the first contract, $500 under the second contract which he claims was unconditional, $1,000 for having secured the return of the fine, and $500 for having attempted to obtain the redelivery of the flour, which feat, he says, he knew could not be accomplished, and for the doing of which, he says, he never had any understanding whatever with Hing, Wong Cheong or Aun Tan—$2300 in all. He admits receiving from Hing the sum of $750, leaving a balance of $1550.00 which he paid to himself by cashing the warrant and crediting the entire proceeds to his account. That is to say, Kepner's charges for services amounted to $300 more than the whole amount of the fine.

24 The appellee's account of his transactions with his clients is such that his credit as a witness is wholly destroyed as to the disputed facts of the case. His own story shows him to be a man lacking in principle and wholly unworthy of the honorable profession to which he unfortunately belongs. He may have been entirely right in cancelling his first contract to defend the accused Chinamen for a retainer of $300 and $700 additional contingent on the result. But why did he wait from March 24th until May 1st, the eve of the trial before doing so? Was it to diminish the chance of the engagement of other counsel and so force his clients to accept such terms as he might offer? He may not have been actuated by

any such motive, but in view of his subsequent conduct it smacks of it. The circumstance may have justified his agreeing for a fee of $500 to obain a return of the fine which had been justly imposed on Aun Tan whom he knew to be guilty, but what is his justification for breaking his agreement in the very moment of success and forcing his clients to agree to pay double his fee for the very same service? Why did he state to Hing after the fine had been remitted by competent authority that he could not recover the money when all that remained to be done was a mere authorization of the commission which would have — conceded, as it was, for the bare asking? Was it to give him an excuse to extort from his clients an additional fee of $500 for the very trivial service of writing a letter to General Chaffee asking him to notify the commission that the fine had been remitted in order that an appropriation bill might be passed enabling the withdrawal of the money from the in-
25 sular treasury? What right did he have to collect $500 for endeavoring to obtain a return of the confiscated flour, a charge which he admits was for services impossible of and wholly unwarranted by any under-standing whatever? fairly accomplishment A But if he can A explain all this, F. C. F. under what rule of law or morals does he justify his act of representing to the bank that he had authority from Aun Tan to collect the insular warrant, when he knew that such authority had been definitely, positively and expressly refused.

Kepner's own testimony justifies the court in concluding that he sought to take a grossly unfair advantage of a confidential relation, and that he is unworthy of credence.

The second agreement as testified to by Hing is therefore accepted by the court and Kepner's account as to that agreement and the subsequent agreements is rejected. Considering that all he accomplished for his clients was to save them from fine or imprisonment in conformity with the second contract, and considering that he was paid $750 for the service, there only remained $50 due him at the time he cashed the warrant. He therefore unlawfully misappropriated $1500.00 viewing the case from the standpoint that the money was the money of Aun Tan and giving Kepner credit for the $450 check delivered to Hing. But if we admit the truth of all that the accused says, if we forget that he took out of the warrant $500 for services rendered to secure the flour without either contract, agreement or understanding with his clients to
26 justify it, if we concede that in all his transactions with Aun Tan he acted in good faith, he is nevertheless guilty of the crime of "estafa."

The warrant delivered into his hands, drawn by the insular government in favor of Aun Tan on the Chartered bank, was the property of Aun Tan, but the money which it represented was not, until it had been delivered to the bank for payment, properly and legally endorsed by Aun Tan, or by his authority. Aun Tan had no money in the bank and no monetary loss was inflicted on him by

illegally cashing his warrant. The injury to him was the delay, annoyance and damage caused by the unlawful misappropriation of the warrant. In a word the bank would have been compelled to pay Aun Tan the amount of the warrant notwithstanding a previous payment to Kepner.

If this be so on the undisputed facts of the case the defendant withdrew from the Chartered bank and appropriated to his own use $2,000 Mex. of its funds by representing to the bank that he had a power of attorney and authority which he did not possess, and *that* constitutes the crime of estafa under the provisions of art. 535, subdivision 1, of the Penal Code.

The allegation of the complaint that the unlawful misappropriation of the proceeds of the warrant was to the prejudice of Aun Tan may be disregarded by virtue of section 7 of G. O. 58, which declares that when an offense shall have been described in the complaint with sufficient certainty to identify the act an erroneous allegation as to the person injured shall be deemed immaterial. In any event the defect, if defect it was, was one of form which did not
27 tend to prejudice any substantial right of the defendant on the merits, and cannot, therefore, under the provisions of section 10 of the same order affect the present proceeding.

It has been stipulated between the appellee and the fiscal that certain affidavits may be considered as evidence on the review and examination of the record by this court on appeal. These affidavits show that Kepner on the 12th of October, 1901, after the question of the validity of his endorsement had been called to his attention by the bank, volunteered to make good to the bank any deficiency which might exist between his account and the amount of the warrant, and that to make this amount good he deposited with the bank, after his arrest and on the 30th of October 1901, $2000 Mex. The affidavits further show that on the 10th of May, 1902, he effected a full, voluntary and satisfactory settlement with his client of all financial differences.

His promise to return the money about the time he was threat-ed with arrest and his subsequent return of it after his arrest, as well as the settlement of his financial differences with his clients constitute no defense to the crime, which, if committed at all by him, was committed on the 23rd of September, 1901. Restitution is not even an attenuating circumstance under article 10 of the Penal Code. It is a matter to be considered solely by the Executive in the exercise of the pardoning power.

The judgment of the lower court acquitting the defendant is reversed with costs against the respondent. Taking into consideration all the evidence in the case the court finds:

1st. That the defendant received on the 21st of September
28 1901, from the insular government for the use and benefit and as the property of his client a certain warrant drawn in favor of said Aun Tan for the sum of $1,000 gold, which the insular treasurer by proper order on its face directed the Chartered Bank of India, Australia and China to pay to said Aun Tan.

2nd. That said defendant against the will and without the consent of said Aun Tan wrote the name of Aun Tan by himself as attorney on the back of said warrant and presented the same to said bank for payment.

3rd. That he represented and stated to said bank that he had a power of attorney from Aun Tan to make such endorsement, and that his representation and statement to that effect to the bank was false and untrue as he the said defendant well knew when he made it.

4th. That in consequence of said unauthorized endorsement by the defendant and his aforesaid false representation and statement to the bank said warrant was cashed, and the whole amount thereof, $2,000 Mex. credited to appellee's personal account in said bank on the 23rd day of September, 1901.

5th. That afterwards, and on the said 23rd of September, 1901, defendant used of said sum so credited to his said account more than $1217.50 Mex. and possibly $1337.50 Mex. for the payment of personal bills and expenses.

6th. That on the 24th of September, 1901, defendant delivered to O. C. Hing for Aun Tan his personal check on said bank for $450, and his receipted bill of $1550 for services rendered, but that said check was never cashed by Aun Tan nor was said bill for $1550 accepted as correct or just.

7th. That neither on the 23rd of September, 1901, nor on the 24th of the same month and year was any greater sum due from said Aun Tan to said defendant than the sum of $50 Mex.

29 Taking into consideration the provisions of article 534, article 535, numbers 1 and 5, and articles 58 of the Penal Code, the court finds as a conclusion of law from the foregoing facts that the defendant Thomas E. Kepner willfully, illegally, fraudulently and feloniously misappropriated and converted to his own use said warrant and the sum of money which he collected thereon, and that he is guilty of the crime of estafa within the intent and meaning of article 535, subdivisions 1 and 5 of the Penal Code.

Wherefore, by reason of the law in such cases made and provided and the articles of the Penal Code above cited, the court orders and adjudges that the defendant Thomas E. Kepner be and he is hereby condemned to one year, eight months and twenty-one days' imprisonment (presidio correccional) with the forfeiture of all public office, profession, trade, and right of sufferage, with costs.

Taking into consideration that the amount collected on the warrant was returned to the bank on the 30th of October, 1901, and that all financial differences between the defendant and Aun Tan were finally amicably settled in May, 1902, no judgment for the return of the money is made, but it is ordered and adjudged that the warrant which forms a part of the record herein be returned to

Aun Tan and that the clerk attach to the record a duly certified copy of said warrant in lieu thereof.

(Signed) JAMES F. SMITH, *Judge.*

We concur:

(S'g'd) CAYETANO ARELLANO, *Chief Justice.*
(S'g'd) FLORENTINO TORRES.
(S'g'd) J. T. COOPER.
(S'g'd) VICTORIANO MAPA.
(S'g'd) CHARLES A. WILLARD.

Afterwards, to-wit, on the 11th day of December, 1902, came Thomas E. Kepner, and filed the following exception to the decision of the court, which said exception is in the words and figures following, to-wit:

United States of America, Philippine Islands, Supreme Court.

UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
THOMAS E. KEPNER, Defendant and Respondent.
} Case Numbered 571.

Comes now the defendant and respondent by Frederick Garfield Waite, his attorney, and excepts to the decision of the court reversing the finding of not guilty and judgment of acquittal heretofore entered by the court of first instance in this cause.

(Signed) FREDERICK GARFIELD WAITE,
Attorney for Defendant and Respondent.

(Endorsed:) Filed in the clerk's office this 11th day of December, 1902, at 2:50 p. m. F. C. Fisher, clerk of the supreme court, by (signed) E. H. Cole, deputy.

Afterwards, to-wit, on the 13th day of December, 1902, the following judgment was entered, to-wit:

United States of America, Supreme Court of the Philippine Islands.

THE UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
THOMAS E. KEPNER, Defendant and Appellee. } Case No. 571.

Judgment, December 13, 1902.

Judgment Book No. 1, p. 306.

The court having regularly acquired jurisdiction for the trial of the above entitled cause, submitted by both parties for decision, after consideration thereof by the court upon the record, its decision and order for judgment having been filed on the 3rd day of December, A. D., 1902,

By virtue thereof it is hereby adjudged and decreed that
31 the judgment of the court of first instance of Manila, dated the eighteenth day of December, A. D., 1901, and against which the above entitled appeal was taken, be and the same is reversed and the accused Thomas E. Kepner is condemned to one year, eight months and twenty one days of correctional imprisonment, together with the suspension from any public office, profession, or trade, or right of suffrage, together with the costs.

It is further ordered that the said cause be remanded to the court of first instance for the corresponding effects.

(Signed) F. C. FISHER, F. C. F.
Clerk of the Supreme Court of the Philippine Islands.

(Endorsed:) Filed this 13th day of December, 1902, at nine a. m. (Signed) F. C. Fisher, clerk of the supreme court. [Seal.]

And afterwards, to-wit, on the 13th day of December, A. D. 1902, there was filed in the clerk's office of said court in the above entitled cause a petition for a writ of error, said petition being in the words and figures following, to-wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippines.

UNITED STATES OF AMERICA, Plaintiff and Appellant,
against
THOMAS E. KEPNER, Defendant and Respondent.

Petition for Writ of Error and Supersedeas. F. C. F.

Thomas E. Kepner, defendant and respondent, in the above entitled cause, feeling himself aggrieved by the decision of the court

made on the 3rd day of December, A. D. 1902, and the judgment entered on the 13th day of December, A. D. 1902, comes now by Frederick Garfield Waite, Esquire, his attorney, and petitions said court for an order allowing said defendant to prosecute a writ
32 of error to the honorable, the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, and in accordance with the provisions of an act of the Congress of the United States entitled "An act temporarily to provide for the administration of the affairs of civil government in the Philippine islands, and for other purposes," approved July 1st, 1902; and also that an order be made fixing the amount of security which defendant shall give pending said writ of error, and that, upon the giving of said security, all further proceedings in this court be suspended and stayed, until the determination of said writ of error by said United States Supreme Court.

FREDERICK GARFIELD WAITE,
Attorney for Defendant and Respondent.

(Endorsed:) Received a copy of the foregoing petition for writ of error, December 13th, 1902. (Signed) Gregorio Araneta, solicitor general. Filed in the clerk's office, supreme court of the Philippines, this 13th day of December, 1902, at 10:00 a. m. F. C. Fisher, clerk of the supreme court, by (signed) E. H. Cole, deputy.

And afterwards, to-wit, on the 13th day of December, A. D., 1902, there was filed in the clerk's office of said court an assignment of errors in said cause, which said assignment of errors is in the words and figures following, to-wit:

United States of America, Philippine Islands, Supreme Court.

UNITED STATES OF AMERICA, Plaintiff and Appellant,
against
THOMAS E. KEPNER, Defendant and Respondent. } Case Number 571.

Assignment of Errors.

Comes now the defendant and respondent by Frederick Garfield Waite, his attorney, and assigns the following assignment of
33 error- upon which he will rely upon his prosecution of the writ of error in the above entitled cause.

I. That this court erred in entertaining an appeal by the United States from the finding of not guilty and judgment of acquittal rendered by the court of first instance of the city of Manila, in this cause, and that this court had no jurisdiction to entertain said appeal, or jurisdiction of this cause, for that said defendant and respondent was never legally tried in said court of first instance of the

city of Manila by a jury as provided in article III, section 2, and amendment VI, of the Constitution of the United States.

II. That this court erred in overruling the motion of defendant and respondent to dismiss the appeal, taken on behalf of the United States, in said cause, from the finding of not guilty and judgment of acquittal rendered in the court of first instance of the city of Manila, made by said defendant on the grounds that under general orders numbered 58, office of the United States military governor in the Philippine islands, series of 1900, the United States is not entitled to an appeal from a finding of not guilty, and a judgment of acquittal, upon a valid complaint, rendered by a court of competent jurisdiction; and, further, because such appeal is prohibited by the Constitution of the United States, amendment V, which provides that no person shall "be subject for the same offense to be twice put in jeopardy," which said motion was overruled by this court on the 6th day of February, A. D., 1902.

III. That this court erred in overruling the motion of defendant and respondent to dismiss the appeal, taken on behalf of the United States, in said cause, from the finding of not guilty and judg-
34 ment of acquittal rendered in the court of first instance of the city of Manila, made by said defendant and respondent on the grounds that under general orders, numbered 58, office of the United States military governor in the Philippine islands, series of 1900, the United States is not entitled to an appeal from a finding of not guilty and a judgment of acquittal, upon a valid complaint, rendered by a court of competent jurisdiction; and, further because such appeal is prohibited by the Constitution of the United States, amendment V, which provides that no person shall "be subject for the same offense to be twice put in jeopardy, 2 and, further, upon the ground that such appeal was prohibited by the act of the Congress of the United States, entitled, "An act temporarily to provide for the administration of the affairs of civil government in the Philippine islands, and for other purposes," which said motion was overruled by this court on the 11th day of October, A. D., 1902.

Wherefore, the said Thomas E. Kepner, plaintiff in error, prays that the judgment of the supreme court of the Philippine islands be reversed, and said cause against him be dismissed, and that he go hence without day.

FREDERICK GARFIELD WAITE,
Attorney for Thomas E. Kepner, Plaintiff in Error.

(Endorsed:) Received a copy of the foregoing assignment of errors this 13th day of December, A. D., 1902. (Signed) Gregorio Araneta, solicitor general. Filed in the clerk's office of the supreme court of the Philippine islands this 13th day of December, A. D., 1902, at 10:00 a. m. F. C. Fisher, clerk of the supreme court, by (signed) E. H. Cole, deputy.

And afterwards, to-wit, on the 16th day of December, 1902, the following ~~A~~ order was ~~A~~ had and entered by the judges of the supreme court of the Philippine islands, in said cause, to-wit: minute unanimously F. C. F.

35 "In the Supreme Court of the Philippine Islands.

UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
THOMAS E. KEPNER, Defendant and Respondent.

"Upon motion of Frederick Garfield Waite, Esquire, attorney for "defendant and respondent, and upon filing a petition for a writ of "error, and an assignment of errors, it is ordered that a writ of "error be and hereby is allowed to have reviewed in the Supreme "Court of the United States, the judgment heretofore entered herein, "and that the writ is to operate as a supersedeas and stay of execu- "tion upon the giving and executing by the defendant of a bond in "due form in the penal sum of $4,000 U. S. currency, with two or "more sufficient sureties thereon duly approved by any judge of "the supreme court of the islands, conditioned that said defendant "shall prosecute his writ of error to effect, and that he will answer "and surrender himself in conformity with the judgment of said "supreme court of the Philippine islands and in satisfaction thereof "should the same be found without error or finally confirmed by "said Supreme Court of the United States."

36 And afterwards, to-wit, on the 17th day of December, A. D. 1902, the following order was had and entered of record in said cause, by the chief ~~A~~ justice of the supreme court of the Philippine islands, which said order is in the words and figures following, to-wit: F. C. F.

In the Supreme Court of the Philippine Islands, at the Court Room in the City of Manila, in the Philippine Islands, on Wednesday, the Seventeenth Day of December, in the Year of our Lord One Thousand Nine Hundred and Two.

Present: The honorable judges of the supreme court of the Philippine islands,—

UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
THOMAS E. KEPNER, Defendant and Respondent. } Case Number 571.

Upon motion of Frederick Garfield Waite, Esquire, attorney for defendant and respondent, and upon filing a petition for a writ of

error, and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the Supreme Court of the United States, the judgment heretofore entered herein, and that the writ is to operate as a supersedeas and stay of execution upon the giving and executing by the defendant of a bond in due form in the penal sum of $4,000 U. S. currency, with two or more sufficient sureties thereon duly approved by any judge of the supreme court of the islands, conditioned that said defendant shall prosecute his writ of error to effect, and that he will answer and surrender himself in conformity with the judgment of said supreme court of the Philippine islands and in satisfaction thereof should the same be found without error or finally confirmed by said Supreme
37 Court of the United States.

C. S. ARELLANO,
Chief Justice of the Supreme Court of the Philippine Islands.

Endorsed: Filed in the clerk's office of the supreme court of the Philippine islands, this 17th day of December, A. D. 1902. F. C. Fisher, clerk.

And afterwards, to-wit, on the 29th day of December, A. D. 1902, there was filed in the clerk's office of said court in the above entitled cause a bond; which said bond is in words and figures following, to-wit:

United States of America, Philippine Islands, Supreme Court.

UNITED STATES OF AMERICA, Plaintiff and Appellant, *against* THOMAS E. KEPNER, Defendant and Respondent.	Case Numbered 571.

Know all men by these presents, that we, Thomas E. Kepner, as principal, and P. J. Moore and Pio Barretto as sureties, are held and firmly bound unto the United States of America, in the sum of four thousand dollars, lawful money of the United States; to which payment well and truly to be made, we bind ourselves, and each of our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of December, in the year of our Lord, one thousand nine hundred and two.

The condition of this obligation is such, that, whereas, the above named Thomas E. Kepner, has sued out a writ of error to the United States Supreme Court to reverse the judgment in the above entitled cause, by the supreme court of the Philippine islands: Now therefore, if the said Thomas E. Kepner shall prosecute said writ
38 of error to effect, and answer and surrender himself in conformity with the judgment heretofore rendered by the su-

preme court of the Philippine islands in said cause, should said judgment be affirmed or found without error by the Supreme Court of the United States, then, and in that event, this obligation shall be null and void, otherwise to be and remain in full force and virtue.

THOMAS E. KEPNER. [SEAL.]
P. J. MOORE. [SEAL.]
PIO BARRETTO. [SEAL.]

CITY OF MANILA, ISLAND OF LUZON, *Philippine Islands,* } *ss:*

P. J. Moore and Pio Barretto came before me personally, and being first duly sworn, each for himself deposes and says that he is a resident of the city of Manila, island of Luzon, Philippine islands, and worth the sum of four thousand dollars exclusive of debts and liabilities.

P. J. MOORE.
PIO PARRETTO.

Subscribed and sworn to before me, this 29th day of December, A. D., 1902.

E. H. COLE, [SEAL.]
Deputy Clerk of the Supreme Court of the Philippine Islands, ex-Officio Notary Public.

Approved:
JAMES F. SMITH,
Justice Supreme Court, P. I.

Endorsed: Received the foregoing document in the office of the supreme court of the Philippines this 29th day of December, 1902 at 11 o'clock a. m. F. C. Fisher, clerk of the supreme court by (signed) E. H. Cole, deputy.

39 And afterwards, to-wit, on the 2nd day of January, 1903, a motion was filed in the clerk's office of the supreme court of the Philippine islands, which said motion is in the words and figures following, to-wit:

United States of America, Philippine Islands, Supreme Court.

THOMAS E. KEPNER, Plaintiff in Error,
against
THE UNITED STATES OF AMERICA, Defendant in Error. } Case Numbered 571.

And now comes said plaintiff in error by Frederick Garfield Waite, his attorney, and prays that this honorable court enter an order directing the clerk thereof to make an duplicate original of

the record in this cause in the English language to the end that said duplicate original of the record duly certified, may be transmitted as the record in this cause to the Supreme Court of the United States.

FREDERICK GARFIELD WAITE,
Attorney for Plaintiff in Error.

Endorsed: Received a true copy of the above motion this — day of December, 1902. (Signed) Gregorio Araneta, solicitor general. Filed this 2nd day of January, 1903, at 8:30 o'clock a. m. F. C. Fisher, clerk of the supreme court of the Philippine islands, by (signed) E. H. Cole, deputy.

And afterwards, to-wit, on the 3rd day of January, 1903, the following order was had and entered in the record of said cause, which said order is in the words and figures following to-wit:

United States of America, Supreme Court of the Philippines.

"Resolved unanimously that the following order be entered in case number 571.—The United States *vs.* Thomas E. Kepner.

40 "The clerk is hereby directed to make a duplicate record in English of the above entitled cause, such record to be regarded as an original in the same manner as the Spanish record."

I, F. C. Fisher, clerk of the supreme court of the Philippine islands, do hereby certify the above and foregoing to be a true and correct translation of the transcript of the record and proceedings had in case number 571, in which The United States is plaintiff and appellant and Thomas E. Kepner is defendant and appellee, as the same appears from the records and files now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, in my office, at Manila, in the Philippine islands, this 3rd day of January, A. D., 1903.

[Seal Corte Suprema, Islas Filipinas.]

FRED C. FISHER,
Clerk of the Supreme Court of the Philippine Islands.

41 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

THOMAS E. KEPNER, Plaintiff in Error,
v.
THE UNITED STATES OF AMERICA, Defendant in Error. } Writ of Error.

The President of the United States of America to the judges of the supreme court of the Philippine islands, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in the said supreme court of the Philippine islands, before you or some of you, between The *United States of America*, plaintiff and appellant, *against Thomas E. Kepner*, defendant and respondent, a manifest error hath happened, to the great damage of the said Thomas E. Kepner, as is said and appears by his petition for a writ of error and assignment of errors, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 3rd day of March next, in said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice
42 of the United States, this 2 day of January, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States the one hundred and twenty-eighth.

[Seal Corte Suprema, Islas Filipinas.]

FRED C. FISHER,
Clerk of the Supreme Court of the Philippine Islands.

The foregoing writ is allowed, and it is ordered that the same shall operate as a supersedeas and stay of execution upon the giving and executing by the defendant of a bond in due form in the penal sum of $4,000 U. S. currency, with two or more sufficient sureties thereon duly approved by any judge of the supreme court of the Philippine islands, conditioned that said defendant shall prosecute his writ of error to effect, and that he will answer and surrender himself in conformity with the judgment of said supreme court of the Philippine islands and in satisfaction thereof should the

same be found without error or finally confirmed by said Supreme Court of the United States.

[Seal Corte Suprema, Islas Filipinas.]

C. S. ARELLANO,
Chief Justice of the Supreme Court of the Philippine Islands.

United States *v.* Thomas E. Kepner. Writ of error. Filed January 2nd, 1902. F. C. Fisher, clerk. Copy deposited for defendant in error in clerk's office supreme court of the Philippine islands.

43 UNITED STATES OF AMERICA, *Philippine Islands,* } *ss:*

In obedience to the foregoing writ of error, I herewith transmit to the Supreme Court of the United States a true and complete transcript in English of the record and proceedings in the foregoing entitled cause this 5th day of January, A. D., 1903.

[Seal Corte Suprema, Islas Filipinas.]

F. C. FISHER,
Clerk of the Supreme Court of the Philippine Islands.

41 Habilitado para el Bienio de 1898–99.

U. S. Military Government, 1902, internal revenue.

N. 9.061.740.

Supreme Court.

Sello 12º Aº 1896 y 97 [Vignette] 5 C. de peso.

In the Supreme Court of the United States.

THOMAS E. KEPNER, Plaintiff in Error,
v.
THE UNITED STATES OF AMERICA, Defendant in Error. } Citation.

UNITED STATES OF AMERICA, *Philippine Islands,* } *ss:*

By the Honorable Cayetano S. Arellano, chief justice of the supreme court of the Philippine islands, to L. R. Wilfley, Esq., attorney general for the Philippine islands, attorney for the United States of America, and to the United States of America, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, in the District of Columbia, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of

the Philippine islands, wherein Thomas E. Kepner is plaintiff in error and The United States of America is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand, at the city of Manila, in the Philippine islands, above named, this 2nd day of January, in the year of our

45 Habilitado para el Bienio de 1898–99.

U. S. Military Government, 1902, internal revenue.

No. 9.061.734.

Supreme Court.

Sello 12ª Aª 1896 y 97. [Vignette] 5 C. de peso.

(Kepner *v.* United States. P. 2.)

Lord, one thousand nine hundred and three, and of the Independence of the United States the one hundred and twenty-seventh.

[Seal Corte Suprema, Islas Filipinas.]

C. S. ARELLANO,
Chief Justice of the Supreme Court of the Philippine Islands.

Frederick Garfield Waite, Esqr, 34 Escolta, Manila, P. I.; Charles H. Aldrich, Esqr., Home Insurance building, Chicago, Illinois, U. S. A., attorneys for plaintiff in error.

A copy of the within paper has been received at this office this 3 day of Jan., 1903.

L. R. WILFLEY,
Attorney General for the Philippines.

Received in the office of the supreme court of the Philippines, Manila, P. I., this 3rd day of January, 1903.

F. C. FISHER,
Clerk of the Supreme Court,
By E. H. COLE, *Deputy.*

8 / 26 a. m.

Endorsed on cover: File No. 18,875. Philippine islands, supreme court. Term No. 244. Thomas E. Kepner, plaintiff in error, *vs.* The United States. Filed March 23, 1903.